Abdul Rahman bin Isa v Public Service Commission, Malaysia

HIGH COURT (JOHORE BAHRU) — ORIGINATING MOTION NO 25-17 OF 1989
LC VOHRAH J
24 JANUARY 1991

Administrative Law — Right to hearing — Dismissal of public servant — Procedural impropriety — Extraneous circumstances taken into account without giving applicant opportunity to reply — Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980, GO 26

The applicant seeks an order of certiorari to quash the decision of the respondent dismissing him from the public service as a customs officer. The applicant was a customs officer attached to the Royal Malaysian Customs & Excise Department, Johore Bahru. In October 1988, he received a letter from the respondent asking the applicant to show cause why the applicant should not be dismissed. The letter alleged that the applicant had replaced some tyres carried on a lorry for which duty had not been paid with other tyres for which duty had been paid. The applicant made his representation by letter denying the allegation and demanded an oral hearing. He was then informed of his dismissal by a letter dated 17 February 1989. In their affidavit, the respondent averred that it was decided to dismiss the applicant after finding that the applicant had, inter alia, failed to report that he had been detained by a group of Chinese men while accompanying the lorry carrying the tyres and this depicted that a conspiracy had taken place. This particular finding had not been communicated to the applicant.

Held, allowing the application:

(1) The finding that the applicant had failed to report that he had been detained by a group of Chinese men and that this failure to report depicted that a conspiracy had taken place, did not form part of the substance of the charge against the applicant in the respondent's show cause letter. The circumstances relating to this alleged conspiracy appear to be the gravamen of the charge against him and those circumstances were required to be made known to him so that he would have had the opportunity to refute them. The respondent had therefore committed a procedural impropriety by not disclosing this information it had, thus depriving the applicant the opportunity to explain or controvert the story relating to the six men.

(2) Obiter: It is implicit under the General Order 26 of the Public Officers (Conduct and Discipline) (Chapter 'D') General Orders 1980 that only if a committee of inquiry is appointed will the applicant be given the opportunity of producing oral evidence. At the stage when the show cause letter was sent and the exculpatory letter furnished with a request for an oral hearing, the applicant was not entitled as a matter of right to an oral hearing and the respondent was entitled to deliberate and decide on the representation as it stood. The decision of the respondent was not in breach of natural justice just because it was arrived at without according to the application the oral hearing he had specifically requested for.

[Bahasa Malaysia summary

Pemohon memohon suatu perintah certiorari untuk membatalkan keputusan responden dipecat daripada perkhidmatan awam sebagai pegawai kastam. Pemohon adalah pegawai kastam yang dilantik oleh Jabatan Kastam & Eksais DiRaja Malaysia, Johor Baru. Dalam Oktober 1988, dia menerima sepucuk surat daripada responden meminta pemohon menunjukkan sebab mengapa responden tidak patut dipecat. Surat itu mengatakan bahawa pemohon telah mengganti beberapa tayar yang dibawa atas satu lori di mana duti tidak dibayar dengan tayar lain di mana duti telah dibayar. Pemohon membuat representasinya dengan surat menafikan pengataan tersebut dan menuntut suatu perbicaraan lisan. Kemudiannya, dia diberitahu tentang pemecatannya melalui sepucuk surat bertarikh 17 Februari 1989. Dalam afidavit mereka, responden berkata bahawa adalah diputuskan untuk memecat pemohon selepas berpendapat bahawa pemohon telah, antara lainnya, gagal merepot bahawa dia ditahan oleh sekumpulan lelaki Cina semasa mengikut lori yang membawa tayar dan ini menunjukkan bahawa satu komplot telah berlaku. Pendapat tertentu ini tidak diberitahu kepada pemohon.

Diputuskan, membenarkan permohonan:

(1) Pendapat bahawa pemohon telah gagal merepot bahawa dia telah ditahan oleh sekumpulan lelaki Cina dan bahawa kegagalan merepot ini menunjukkan bahawa satu komplot telah berlaku, tidak membentuk sebahagian isi kandungan pertuduhan terhadap pemohon dalam surat menunjukkan sebab responden. Keadaan yang berkenaan dengan komplot yang dikatakan ini nampaknya perkara pokok pertuduhan terhadapnya dan keadaan tersebut perlulah diberitahu kepadanya supaya dia mempunyai peluang untuk menyangkalnya. Oleh itu, responden telah melakukan satu prosidur yang sumbang dengan tidak memberitahu maklumat yang dia ada ini, jadi melucutkan pemohon peluang menerangkan atau menyangkal cerita berkenaan dengan enam orang itu.

(2) Obiter: Adalah tersirat di bawah Perintah Am 26, Pegawai Awam (Kelakuan dan Tatatertib) (Bab'D') Perintah Am 1980 bahawa hanya jika satu jawatankuasa siasatan dilantik, barulah pemohon diberi peluang mengemukakan keterangan lisan. Pada peringkat bila surat untuk menunjukkan sebab dihantar dan surat membebaskan dari tuduhan yang diberi memerlukan suatu perbicaraan lisan, pemohon tidak berhak sebagai memang berhak kepada suatu perbicaraan lisan dan responden berhak menimbang dan memutuskan atas representasi seperti yang sedia ada. Keputusan responden tidak melanggar keadilan asasi hanya kerana ianya dibuat tanpa mengikut permohonan perbicaraan lisan yang dia memohon secara tertentu.]

Cases referred to

1 *Najar Singh* v *Government of Malaysia & Anor* [1976] 1 MLJ 203 (folld)
2 *Ketua Pengarah Kastam* v *Ho Kwan Seng* [1977] 2 MLJ 152 (refd)
3 *Shamsiah bte Ahmad Sham* v *Public Services Commission, Malaysia & Anor* [1990] 3 MLJ 364 (folld)

Legislation referred to

Public Officers (Conduct and Discipline) (Chapter 'D') General Order 1980 GO 26

T Balaskanda for the applicant.
Noor Aini bte Zulkiflee for the respondent.

Cur Adv Vult

LC Vohrah: By this notice of motion the applicant seeks an order of certiorari in order to quash the decision of the respondent dismissing him from the public service as a customs officer.

The applicant was a customs officer attached to the Royal Malaysian Customs & Excise Department, Johore Bahru and at the time of dismissal had been in service for seven years. On or about 10 October 1988 the respondent by letter dated 27 September 1988 asked the applicant to show cause as to why he should not be dismissed from the public service. This letter is reproduced in full:

Ruj Kami: SPA.SULIT.239391/3/(12)

27 September 1988
16 Safar 1409

Encik Abdul Rahman bin Isa,

Melalui:
dan
Salinan:

Ketua Pengarah Kastam,
Kastam dan Eksais Diraja Malaysia,
Blok 11, Kompleks Pejabat-Pejabat Kerajaan,
Jalan Duta,
50596 Kuala Lumpur

(up: Encik Mohd Noor bin Abdul Hamid)

Tuan,

Kenyataan alasan-alasan membuang kerja

Saya memaklumkan iaitu berikutan dengan laporan yang diterima, maka Suruhanjaya ini sebagai Pihak Berkuasa Tatatertib yang berkenaan telah membuat keputusan untuk mengambil tindakan tatatertib dengan tujuan buang kerja terhadap tuan di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980 atas pertuduhan berikut:

'Bahawa tuan, Abdul Rahman bin Isa, Pegawai Kastam Tingkatan I (No 4414), Bahagian Import 'A', Jabatan Kastam dan Eksais Diraja Malaysia, Johor Bahru, Johor Darul Takzim ketika bertugas di Jabatan Kastam dan Eksais Diraja Malaysia, Kuala Sedili, Kota Tinggi, Johor Darul Takzim pada 1 Disember 1986 di antara pukul 4 petang hingga 9 malam ketika dalam perjalanan mengiringi sebuah lori No Pendaftaran JT1068 dengan muatan lebih kurang 100 biji tayar yang disyaki belum dibayar duti kastam dari Simpang Blungkor di kawasan Felda Papan Timur, Kuala Sedili Johor, Darul Takzim ke pejabat tuan pada ketika itu telah membenarkan tayar-tayar tersebut dipunggah dari lori No Pendaftaran JT 1068 dan ditukarkan dengan 10 biji tayar jenis 'Bridgestone' dan 30 biji tayar jenis 'Michelin' yang telah dibayar duti kastamnya. Akibat perbuatan tuan membenarkan pemunggahan dan pertukaran tayar tersebut telah menyebabkan pihak Jabatan tidak dapat membuat pemeriksaan terhadap lebih kurang 100 biji tayar berkenaan dengan kerugian duti kastam yang belum dibayar dianggarkan bernilai lebih kurang $8,000 (Ringgit Lapan Ribu). Perbuatan tuan ini adalah bercanggah dengan Perintah Am 4(2)(c)(i), 4(2)(g) dan 4(2)(i), Perintah-perintah Am Pegawai Am (Kelakuan dan Tatatertib) (Bab 'D') 1980 yang menyatakan seseorang pegawai tidak boleh berkelakuan dengan apa-apa cara yang mungkin menyebabkan syak yang munasabah bahawa ia telah membiarkan kepentingan persendiriannya dan bercanggah dengan kewajipan awamnya sehingga menjejaskan kegunaannya sebagai seorang pegawai awam, tidak jujur, tidak bertanggungjawab dan ingkar perintah atau berkelakuan dengan apa-apa cara yang boleh ditafsirkan dengan munasabah sebagai ingkar perintah.

2 Mengikut kehendak Perintah Am 26(2), Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D') 1980, tuan adalah diminta mengemukakan:

(a) jawapan kepada pertuduhan ini;
(b) hujah-hujah sebagai pembelaan diri mengapa tindakan tatatertib buang kerja tidak boleh diambil terhadap tuan sekarang.

Jawapan dan hujah-hujah pembelaan diri tuan itu hendaklah dikemukan kepada Setiausaha, Suruhanjaya Perkhidmatan Awam, melalui Ketua Jabatan tuan dalam tempoh dua puluh (20) hari daripada tarikh tuan menerima surat ini. Sekiranya tuan tidak memberi sebarang jawapan dalam tempoh masa yang ditetapkan itu, tuan akan dianggap sebagai tidak hendak mengemukakan sebarang pembelaan diri dan perkara ini akan diputuskan atas keterangan-keterangan yang ada sekarang ini sahaja.

3 Sila tuan akui penerimaan surat ini.

'Berkhidmat untuk Negara'

Saya yang menurut perintah,

(Tandatangan)

(Dato' Sulaiman bin Osman)
Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Malaysia

By a letter dated 14 October 1988 the applicant made his representation giving the reasons as to why he should be exculpated. His letter reads:

Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Bahagian Naik Pangkat/Tatatertib,
Tingkat 18, Bangunan Perangsang Segemal,
Jalan Kampung Attap
50520 Kuala Lumpur.

Melalui:
dan
Salinan

Ketua Pengarah Kastam,
Kastam & Eksais DiRaja Malaysia,
Blok 11, Kompleks Pejabat Kerajaan,
Jalan Duta,
50592 Kuala Lumpur.

Tuan,

Per: Kenyataan Alasan-Alasan Membuang Kerja

Surat tuan bertarikh 27 September 1988 dirujuk. Dukacita dimaklumkan bahawa tuduhan yang dibuat terhadap saya itu tidak benar. Tuan tidak boleh membuat tuduhan berasaskan satu syak wasangka sahaja. Saya berani mengangkat sumpah bahawa tuduhan yang dibuat kepada saya tidak benar. Tidak ada bukti yang menunjukkan bahawa lori JT 1068 ada membawa muatan lebih kurang 100 biji tayar. (Tuduhan tidak menunjukkan jumlah tayar yang sebenarnya.)

Dalam Cawangan Pencegah di Jabatan Kastam dan Eksais DiRaja, pegawai-pegawai kastam Tingkatan Biasa selalunya diberi hadiah apabila mendapati satu-satu kes. Jika kes ini telah diperolehi oleh kumpulan pegawai kastam yang lain

maka pegawai kastam yang mempunyai maklumat yang sama dan tidak memperolehi kes ini tidak akan mendapat hadiah atau reward. Dalam kes ini jelas bahawa pada 1 Disember 1986 saya telah menahan sebuah lori lebih kurang jam 2.45 petang. Lori ini setelah ditahan dan dalam proses pemeriksaan, satu kenderaan Jabatan Kastam WAY 1249 telah tiba di tempat itu. Terdapat tiga orang pegawai kastam dari Bahagian Pencegah, Johor Bahru. Mereka keluar dari kereta tersebut dan mengatakan bahawa mereka ada maklumat ke atas lori ini dan ini adalah kes mereka. Saya menghalang mereka dari mengambil alih kes ini dan mengatakan bahawa ini adalah kes yang diperolehi oleh saya. Mereka garikan pemandu lori dan beredar dari situ.

Pegawai kastam dari Johor Bahru tidak langsung memeriksa isi kandungan lori JT 1068. Ini cuma diagak oleh mereka sahaja. Mereka juga boleh mengagak terdapat cuma 40 biji tayar ataupun 200 biji tayar. Jadi selagi tidak diperiksa dan dikira ini cuma anggapan sahaja. Yang sebenarnya lori yang dibawa balik ke Pejabat Kastam Kuala Sedeli itu hanya pertama kali diperiksa rapi di Pejabat Kastam, Kuala Sedili. Ini boleh disahkan oleh Penguasa Kastam, En Siva.

Tuduhan bahawa terdapat penukaran tayar dari lebih kurang 100 biji kepada 40 biji tayar juga tidak termasuk akal oleh sebab saya tidak akan berani berbuat demikian memandangkan bahawa saya tahu yang Pegawai Kastam Pencegah, Johor Bahru juga telah melihat saya memperolehi kes ini dan sudah tentu mereka akan melaporkan hal ini kepada Ketua Bahagian Pencegah, Johor Bahru.

Saya ingin mendengar saksi-saksi bagi pihak tuan memberi keterangan dalam kes ini supaya saya dapat membela diri saya dengan menyoal balas ketiga-tiga Pegawai Kastam Pencegah tersebut untuk membuktikan bahawa keterangan mereka tidak benar.

Saya menafikan dengan keras tuduhan yang dibuat terhadap saya. Jika terdapat bukti-bukti yang nyata saya rela dituduh di mahkamah di mana saya boleh membela diri saya.

Pegawai Penyiasat Jabatan Kastam, Johor Bahru, En Ishak di dalam soal siasat beliau beberapa kali untuk memperdayakan saya dan mencadangkan macam-macam terhadap saya. Oleh sebab itu saya memberitahu beliau bahawa jika betul seperti apa yang dicadangkan oleh beliau yang saya telah melakukan perkara ini, maka saya rela dituduh di mahkamah. Beliau marah apabila saya bercakap begitu dan beliau berkata 'Aku ibarat durian dan kau mentimun. Jika golek durian, mentimun juga yang akan cedera dan jika mentimun yang menggolek, mentimun juga yang akan cedera.' Beliau juga berkata bahawa beliau akan memaksa pemandu untuk membuat cerita supaya saya bersalah.

Saya memina suatu pembicaraan di mana saya boleh dengar saksi-saksi yang akan dipanggil oleh pihak tuan dan saya juga akan mendapatkan saksi-saksi saya yang boleh memberi keterangan lisan kepada tuan untuk membuktikan bahawa tuduhan ini tidaklah benar. Saksi-saksi saya dapat membuktikan bahwa tuduhan penukaran tayar tidak berlaku langsung. Apa yang ditahan telah dibawa ke Pajabat Kastam, Kuala Sedeli dan diserahkan kepada Penguasa Kastam, En Siva. Semasa En Siva melepaskan lori serta tayar selepas berpuas hati bahawa cukai telah dibayar, enjin lori tidak boleh start. En Siva membenarkan bateri kereta beliau digunakan untuk start enjin lori tersebut. Ini menunjukkan bahawa lori ini memang menghadapi masalah. Jadi kelewatan tiba di Pejabat Kastam adalah sebab enjin mati dan susah dihidupkan semula.

Saya telah menjalankan tugas saya dengan jujur, bertanggungjawab dan saya tidak ingkar perintah. Pegawai-pegawai Kastam Pencegah Johor Bahru yang meminta supaya kes ini diserahkan kepada mereka bukanlah pegawai kastam yang berpangkat lebih tinggi dari saya. Saya tidak pernah membenarkan kepentingan persendirian bercanggah dengan kewajipan sebagai pegawai awam.

Saya merayu supaya tuan tidak membuat sebarang keputusan tanpa memberi peluang saya membela diri di dalam pembicaraan di mahkamah atau pembelaan diri dihadapan Lembaga Tata Tertib setelah mendengar saksi-saksi bagi pihak tuan.

Atas kerjasama tuan saya ucapkan ribuan terima kasih.

Yang benar. (Emphasis added.)

Sometime around 1 March 1989 he received a letter dated 17 February 1989 from the respondent informing him that he had been dismissed from the service with immediate effect. it reads:

Encik Abdul Rahman bin Isa

Melalui
dan
Salinan:

Ketua Pengarah Kastam,
Ibu Pejabat Kastam dan Eksais Diraja Malaysia,
Bahagian Pentadbiran Am dan Kewangan,
Blok 11, Kompleks Pejabat-pejabat Kerajaan,
Jalan Duta,
50596 Kuala Lumpur

Tuan,

Keputusan Tatatertib Suruhanjaya Perkhidmatan Awam

Saya diarah menarik perhatian kepada surat Suruhanjaya SPA.SULIT. 239391/3/(12) bertarikh 22 September 1988 meminta tuan mengemukakan hujah-hujah bagi membebaskan diri tuan daripada tindakan tatatertib di bawah Perintah Am 26, Perintah-Perintah Am Pegawai Awam (Kelakuan dan Tatatertib) (Bab 'D'), 1980. Tuan telah mengemukakan jawapan sebagai pembelaan diri menerusi surat tuan bertarikh 14 Oktober 1988.

2 Dimaklumkan bahawa Suruhanjaya Perkhidmatan Awam dalam Mesyuaratnya yang ke-1537 pada 30 Januari 1989 setelah menimbangkan dengan teliti kes tuan pada keseluruhannya telah memutuskan bahawa tuan dikenakan hukuman buang kerja berkuatkuasa dengan serta-merta.

'Berkhidmat Untuk Negara'

Saya yang menurut perintah,
tandatangan
(Roslee bin Anuar)
Bahagian Naik Pangkat/Tatatertib,
bp Setiausaha,
Suruhanjaya Perkhidmatan Awam,
Malaysia.

The respondent followed the procedure laid down in GO 26 of the Public Officers (Conduct and Discipine) (Chapter 'D') General Orders 1980 which reads as follows:

26 (1) Tatacara bagi kes-kes yang patut dikenakan hukuman buang kerja atau turun pangkat.

Jika representasi dibuat kepada Pihak Berkuasa Tata-tertib Yang Berkenaan atau jika didapati olehnya bahawa seseorang pegawai adalah bersalah kerana kerja yang tidak memuaskan dan kerja atau salah-laku itu pada pendapat Pihak Berkuasa Tatatertib itu, patut dikenakan hukuman buang kerja atau turun pangkat, maka peruntukan-peruntukan di dalam perenggan-perenggan yang berikut hendaklah dipakai.

(2) Pihak Berkuasa Tatatertib Yang Berkenaan hendaklah, setelah menimbangkan segala maklumat yang ada dalam miliknya bahawa ada kes prima facie untuk membuang kerja atau menurunkan pangkat, mengarahkan supaya satu pernyataan bertulis, yang disediakan jika perlu, dengan bantuan Jabatan Undang-Undang, dihantar kepada pegawai itu, menyatakan alasan atau alasan-alasan yang dicadangkan untuk membuang kerja atau menurunkan pangkat pegawai itu dan hendaklah meminta pegawai itu membuat, dalam tempoh tidak kurang daripada empat belas hari daripada tarikh surat itu diterima, satu representasi secara bertulis yang mengandungi alasan-alasan yang ia hendak gunakan untuk membebaskan dirinya.

(3) Jika setelah dipertimbangkan representasi tersebut, Pihak Berkuasa Tatatertib Yang Berkenaan berpendapat bahawa kerja atau kelakuan pegawai itu yang tidak memuaskan adalah tidak cukup berat untuk menganggapkan patut ia dibuang kerja atau diturunkan pangkat, Pihak Berkuasa Tatatertib itu boleh mengenakan apa-apa hukuman yang lebih ringan sebagaimana yang difikirkannya patut ke atas pegawai itu.

(4) Jika pegawai itu tidak mengemukakan apa-apa representasi dalam tempoh yang ditentukan itu, atau jika ia mengemukakan representasi yang tidak dapat membebaskan dirinya dengan memuaskan hati Pihak Berkuasa Tatatertib Yang Berkenaan, maka Pihak Berkuasa Tatatertib itu hendaklah terus menimbangkan dan memutuskan perkara membuang kerja atau menurunkan pangkat pegawai itu.

(5) Pihak Berkuasa Tatatertib Yang Berkenaan berpendapat bahawa kes terhadap pegawai itu memerlukan penjelasan selanjutnya, Pihak Berkuasa Tatatertib itu bolehlah melantik satu Jawatankuasa Siasatan yang terdiri daripada tidak kurang daripada dua orang pegawai kanan Kerajaan yang hendaklah dipilih dengan mengambil perhatian yang semestinya tentang kedudukan pegawai yang berkenaan itu dan tentang jenis serta beratnya aduan-aduan yang menjadi perkara siasatan itu, dengan syarat bahawa seseorang pegawai yang lebih rendah pangkatnya daripada pegawai yang disiasat itu atau Ketua Jabatan pegawai itu tidak boleh dipilih menjadi Ahli Jawatankuasa itu.

(6) Pegawai itu hendaklah diberitahu bahawa, pada hari yang ditetapkan, soal buang kerja atau turun pangkat itu akan dibawa ke hadapan Jawatankuasa dan bahawa ia akan dibenarkan dan jika Jawatankuasa memutuskan sedemikian, ia adalah dikehendaki hadir di hadapan Jawatankuasa itu dan membebaskan dirinya.

(7) Jika saksi-saksi diperiksa oleh Jawatankuasa, pegawai itu hendaklah diberi peluang hadir dan menyoal saksi-saksi itu bagi pihak dirinya sendiri dan tiada keterangan berupa dokumen boleh digunakan terhadapnya melainkan jika ianya telah terlebih dahulu diberi satu salinan dokumen itu atau dibenarkan melihatnya.

(8) Jawatankuasa boleh membernarkan Kerajaan atau pegawai itu diwakili oleh seorang pegawai dalam perkhidmatan awam atau, dalam keadaan tertentu, oleh seorang peguambela dan peguamcara dan, tertakluk kepada apa-apa penangguhan yang menasabah perlu untuk membolehkan pegawai itu sendiri membentangkan kesnya, boleh menarik balik kebenaran itu pada bila-bila masa:

Dengan syarat jika Jawatankuasa itu membenarkan Kerajaan diwakili, ia hendaklah membenarkan pegawai itu diwakili.

(9) Jika dalam masa menjalankan siasatan itu, terzahir lagi alasan-alasan untuk membuang kerja pegawai itu, dan Pihak Berkuasa Tatatertib Yang Berkenaan fikirkan patut untuk meneruskan tindakan terhadap pegawai itu, pegawai itu hendaklah diberi satu pernyataan bertulis mengenai alasan-alasan itu dan langkah-langkah yang sama hendaklah diambil seperti yang ditetapkan di atas mengenai alasan-alasan yang asal itu.

(10) Setelah menyiasat perkara itu, Jawatankuasa itu hendaklah membuat satu laporan kepada Pihak Berkuasa Tatatertib Yang Berkenaan. Jika Pihak Berkuasa Tatatertib itu berpendapat bahawa laporan itu tidak jelas mengenai apa-apa perkara atau bahawa siasatan selanjutnya adalah dikehendaki, maka perkara itu boleh dirujukkan kembali kepada Jawatankuasa itu untuk menjalankan siasatan dan membuat laporan selanjutnya.

(11) Jika setelah menimbangkan laporan Jawatankuasa itu, Pihak Berkuasa Tatatertib Yang Berkenaan berpendapat —

(a) bahawa pegawai itu patut dibuang kerja atau diturunkan pangkat, tetapi patut menerima hukuman yang lebih ringan, Pihak Berkuasa Tatatertib itu boleh mengenakan ke atas pegawai itu apa-apa hukuman yang lebih ringan sebagaimana yang difikirkan patut; atau

(b) bahawa pegawai itu tidak patut dibuang kerja atau diturunkan pangkat, tetapi patut menerima hukuman yang lebih ringan, Pihak Berkuasa Tatatertib itu boleh mengenakan ke atas pegawai itu apa-apa hukuman yang lebih ringan sebagaimana yang difikirkan patut; atau

(c) bahawa pembicaraan itu menzahirkan alasan-alasan yang cukup untuk menghendaki supaya pegawai itu bersara demi kepentingan awam, Pihak Berkuasa Tatatertib itu hendaklah mengesyorkan kepada Kerajaan dengan sewajarnya. Soal pencen hendaklah diuruskan di bawah Undang-Undang Pencen.

In his affidavit in support of this notice of motion the applicant avers that he had not committed any breach of the General Orders; that the facts of the case would show that only 40 tyres were detained by him and not 100 as alleged and that this could have been verified by the senior officer ivestigating the case with the owner of the tyres; and that the allegation he had released 100 tyres and substituted them with 40 other tyres was without any foundation and was actuated by malice towards him as he had refused to hand over his case to the three customs officers from the Preventive Branch. In his affidavit encl (5) in support of this application one Tee Kok Cheng avers that he was the owner of the 40 tyres that had been detained; that he received a telephone call at about 10pm from the driver of the lorry conveying the tyres that the tyres had been detained;

that after locating the import declaration for the 40 tyres he left for Kuala Sedeli at about 11pm arriving there at 1.40am the following day; that he waited at the Customs Station until 2.30am when the senior officer arrived; that he produced the customs import declaration form to the senior officer who after examination released the tyres on being satisfied that duty had been paid on them; that the lorry could not at first be started and was only started with the aid of the senior officer's car battery; and that he had at no time caused 100 tyres to be conveyed by the lorry or changed 100 tyres to 40 tyres. In his affidavit in reply the chairman of the respondent averred that the respondent deliberated on the applicant's case on 30 January 1989 and decided to dismiss the applicant from service after finding that:

> (a) *the failure of the applicant in reporting that he had been detained by a group of Chinese men depicted that a conspiracy had taken place*; (emphasis added)
> (b) the applicant's refusal to allow the three Customs Officers from the Preventive Branch to assist in the detention of the said lorry JT 1068 was highly suspect;
> (c) the offence by him was a grave and serious one and the arguments for his defence by virtue of his said reply was weak and of no merits and thus could not be accepted. Further, we were of the opinion that the representation of the applicant by virtue of his said reply had failed to exonerate himself to our satisfaction and thus there was no necessity for a further explanation.

In his affidavit-in-reply the applicant denied the existence of the six Chinese men at any stage of the incident.

On the facts as presented above counsel has challenged the decision of the respondent to dismiss the applicant from the service on three grounds which can be subsumed under the following brief heads:

(1) Denial of an oral hearing.
(2) Consideration of extraneous matter.
(3) Post-decisional hearing.

(1) *Denial of an oral hearing*

There is no dispute that any action for dismissal or reduction in rank in respect of the applicant had to comply with the procedure above-stated. The applicant's main complaint is that he was not given an opportunity of being heard orally before being dismissed and that he was entitled to an oral hearing after having demanded one. The question to be considered is whether under the procedure laid down in the above-mentioned general order he is entitled to an oral hearing. Paragraph (5) provides that if, after the accused officer has made his representation the Disciplinary Authority considers that the case against the officer requires further clarification, it may appoint a Committee of Inquiry and para (6) provides that the officer has to be given notice of the day on which the question of his dismissal or reduction in rank will come before the Committee and told that he will be allowed and, if the Committee so determine, required to appear before it and exculpate himself. Paragraph (7) provides that he had to be given the opportunity of being present when witnesses are examined and of putting questions to them. The Committee then is required by para (11) to report to the Disciplinary Authority which will then act on its report. It is I think, implicit that only if a Committee of Inquiry is appointed will the applicant be given the opportunity of producing oral evidence (see *Najar Singh* v *Government of Malaysia & Anor*[1] at p 205 left column D). The argument of federal counsel (as I understand it) is that the respondent having acted under para (4) in deciding to dismiss the applicant after considering his representation had a discretion and was 'entitled to disallow the oral hearing requested for' as it had complied with the audi alteram partem rule and accordingly there has been no breach of natural justice. I agree. At the stage when the show cause letter was sent and the exculpatory letter furnished with a request for an oral hearing there was, in my view, no obligation on the part of the respondent to grant an oral hearing and the respondent was entitled to deliberate and decide on the representation as it stood. Accordingly, I hold that the applicant was not entitled as a matter of right to an oral hearing and the decision of the respondent cannot be said to have been made in breach of natural justice just because it was arrived at without according the applicant the oral hearing he had specifically requested for. As was pointed out by Raja Azlan Shah FJ (as he then was) in *Ketua Pengarah Kastam* v *Ho Kwan Seng*:[2]

> ... the rule of natural justice that no man may be condemned unheard should apply to every case where an individual is adversely affected by an administrative action, no matter whether it is labelled 'judicial', 'quasi-judicial', or 'administrative' or whether or not the enabling statute makes provision for a hearing. But the hearing may take many forms and strict insistence upon an inexorable right to the traditional courtroom procedure can lead to a virtual administrative breakdown. That is because a formal hearing is too slow, too technical and too costly. Lord Shaw's caveat on administrative adjudication that 'judicial methods may ... be entirely unsuitable, and produce delays, expenses, and public and private injury' is too well-known to be side-stepped.

(2) *Consideration of extraneous matter*

As has been adverted to, the respondent's chairman stated that in its deliberations it found that the applicant had failed to report that he had been detained by a group of six Chinese men and this failure to report 'depicted that a conspiracy had taken place'. This fact did not form part of the substance of the charge against the applicant in the respondent's show cause letter. It is clear this question of a conspiracy was an important factor which affected the decision of the respondent to dismiss the applicant. What the facts were which gave

rise to the inference that there was a conspiracy involving the applicant have not been disclosed and clearly the adverse inference drawn against the applicant was made because of his failure to mention these six persons in his written representation. Counsel for the applicant contends that non-disclosure of the circumstances relating to these individuals and the failure to allow the applicant to give an explanation regarding them constituted a breach of natural justice. In other words, the applicant's complaint is that the respondent in arriving at its decision took into account extraneous matter, namely, the circumstances relating to these six men, without giving the applicant the chance to explain their presence or involvement if any. Federal counsel in reply argues that the respondent when it deliberates is guided by its powers under Chapter 'D' of the General Orders and although it takes into account relevant reports brought by the department concerned it cannot be said that it acted unfairly or improperly. Both counsel made reference to the most recent case of *Shamsiah bte Ahmad Sham* v *Public Services Commission, Malaysia & Anor*[3] which involved a book-binder with the Government Printing Department who was dismissed by the respondent after she had been found guilty of negligence and dereliction of duty. She applied to the High Court for a declaration that her dismissal was null and void. Her application was dismissed by the High Court and she appealed. The core of her complaint in the Supreme Court was that the respondent in arriving at its decision to dismiss her from service had taken into account extraneous matters, namely, her record of past conduct which had been entered in her record of service and produced by her departmental head to the respondent without giving her an opportunity to explain, contradict or rebut them. It was held, inter alia, that the respondent had infringed the rule of natural justice in not affording her the opportunity to explain or controvert her record of service which played a part in influencing its decision to impose the severest punishment permissible under the relevant regulations and on that ground and in the light of the authorities cited the court had no alternative but to allow the appeal. Jemuri Serjan SCJ had this to say (at p 368):

> We are not saying and should not be quoted as saying that the past record of the appellant should not be taken into account in considering her guilt or the appropriate punishment if she were found guilty of the charge. What we are saying is that if these materials which have such damning effect on her case are to be used against her she should be given a right to be heard on them. It is not a matter of pure technicality but it is absolutely fundamental in law that the appellant should have been given an opportunity of stating her case regarding her past conducts, considering that the dismissal of a civil servant is no light matter.
>
> The matter is not free from authorities and the law on it is well settled. We find support for this proposition in many cases. In the case of *Kanda* v *Government of the Federation of Malaya* [1962] MLJ 169 Lord Denning at p 172 said:
>
> 'If the right to be heard is to be a real right which is worth anything, it must carry with it a right in the accused man to know the case which is made against him. He must know what evidence has been given and what statements have been made affecting him; and then he must be given a fair opportunity to correct or contradict them. This appears in all the cases from the celebrated judgment of Lord Loreburn LC in *Board of Education* v *Rice* [1911] AC 179 down to the decision of their Lordship's Board in *Ceylon University* v *Fernando* [1960] 1 WLR 223. It follows, of course, that *the judge or whoever has to adjudicate must not hear evidence or receive representation from one side behind the back of the other.* The court will not enquire whether the evidence or representations did work to his prejudice. Sufficient that they might do so. The court will not go into the likelihood of prejudice. The risk of it is enough. *No one who has lost a case will believe he has been fairly treated if the other side has access to the judge without his knowing.*' (The emphasis is ours.)

As stated earlier, the respondent relied substantially on facts relating to the six Chinese men and on the failure of the applicant to report his detention by these six persons as the basis that there had been a conspiracy to justify its order for his dismissal. The alleged presence and involvement of these six men, whose very presence the applicant categorically denies, was of damning effect and was in fact the foremost reason given by the respondent for its decision. The circumstances relating to this alleged conspiracy would appear to be the gravemen of the charge against him and were not made known to him, and applying the principles enunciated above those circumstances were required to be made know to him so that he would have had the opportunity to refute the existence of such a conspiracy. The respondent had, accordingly, committed a procedural impropriety by not disclosing this information it had thus depriving the applicant the opportunity to explain or to controvert the story relating to these six persons whose alleged involvement at the scene played such an important part in influencing the respondent's decision. The right to a hearing has no meaning if all relevant material to be relied upon by an adjudicating body against a person is not brought to his notice and he be given an opportunity to comment, explain or rebut such material. (See MP Jain's *Administrative Law of Malaysia and Singapore* (2nd Ed) p 267). I am therefore obliged to find that the order dismissing the applicant was null and void and must be quashed although it has been averred by the respondent's chairman that the respondent 'had acted in a fair manner independently, bona fide and lawfully at all material times'.

(3) *Post-decisional hearing*

Counsel for the applicant argued as his final ground that from the language of the introductory paragraph of the show cause letter it is clear that the respondent had made up its mind to dismiss the applicant even before hearing him. Although I do not have to deal with this

ground in the light of my finding in respect of ground (2) I think it is appropriate for the sake of completeness that I address this point. What that paragraph states is that the respondent as a result of a report it had received had decided as the Disciplinary Authority concerned to take disciplinary action against the applicant with a view to dismissal under GO 26. What has to be emphasized is the fact that the action was being taken only with a view to dismissal under GO 26 which specifically lays down the procedure. That statement is then followed by the charge. It can only mean what it says and cannot be read as indicating that the respondent had already made up its mind to dismiss him without first considering his representation. It is clear from the provisions of this general order that a prima facie case has first to be made out from information it has received before an officer is called upon to answer the charge by way of a written representation. (See paragraph (2).) That was clearly what happened in the present case: upon receipt of a report the respondent decided (obviously after considering it) to call upon the applicant to answer the charge. It cannot and should not be inferred from the language of the introductory paragraph that, as contended by counsel, a decision had already been made to dismiss him from the service before he was asked to make his written exculpatory representation.

For the reasons given under ground (2), I make an order in terms of the application.

Application allowed.

Solicitors: *Zaman & Associates.*

Reported by *Zarinah Marican*

Development & Commercial Bank Bhd, Johore Bahru v Kim Ming Choon

HIGH COURT (JOHORE BAHRU) — ORIGINATING SUMMONS NO 31-345 OF 1986
JAMES FOONG JC
10 JANUARY 1991

Land Law — Sale by public auction — Whether rights of chargor cease before conclusion of sale — Failure of purchaser to make payment of balance within stipulated time — Whether purchaser entitled to extension of time to make payment under order of court for sale — Whether senior assistant registrar has power to vary the order for sale issued by judge – National Land Code 1965, ss 256 & 257

Land Law — Indefeasibility of title — Whether a purchaser who has breached the conditions of order for sale may be allowed to be the registered proprietor — National Land Code 1965, s 340

Civil Procedure — Parties — Joinder of party – Whether to dismiss application to vary order of sale where the parties did not apply to be joined in the original action — Rules of the High Court 1980, O 15 r 6

In this case, two appeals were brought against the decisions of the senior assistant registrar. Kim Ming Choon, the appellant, was the registered owner of a piece of property charged by him to Development & Commercial Bank Bhd, Johore Bahru ('D&C Bank') by way of a first legal charge. There was a default in repayment of the said loan and D&C proceeded with foreclosure proceedings against the said property. An order for sale was granted which consisted of various sub-orders, one of which was that the date of the sale should be fixed by the senior assistant registrar.

Subsequent to the order of sale on 17 January 1987, the senior assistant registrar of the High Court made a consequential order of sale which ordered the application of the Johor Conditions of Sale. One Yu Cheng Hee ('the bidder') successfully bid for the purchase of the said property at a public auction and paid 25% of the purchase price and the balance of the purchase price would have to be paid on 28 May 1988 ('the completion date') which was three months from the date of successful bid but subsequently he discovered that there was a caveat on the said property lodged by a third party, one Lee Thian Pah ('the caveator'), who purported to have entered into a sale and purchase agreement with the appellant for the purchase of the said property after the order for sale was granted.

Before the completion date, the bidder and his wife applied to the senior assistant registrar to have the completion date extended. This application bears exactly the same heading as the order for sale except for certain items. The registrar granted an order for extension to 12 April 1988. The appellant applied to set aside the said extension but his application was dismissed. The appellant then appealed to the High Court and this is the first appeal in this case.

While awaiting hearing of the first appeal, the bidder proceeded to appeal for further extension of time to complete the sale. On his third attempt the senior assistant registrar granted it. The appellant again applied to set aside this order for extension. The senior assistant registrar dismissed the application and the appellant appealed against the decision of the senior assistant registrar. This appeal forms the second appeal in this case. The bidder had since the filing of the second appeal by the appellant paid the balance of the purchase price